88-1840

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR VOELLINGER, for himself and as a class representative,

Petitioner,

vs.

THE POLICE RETIREMENT SYSTEM OF ST. LOUIS, *et al.*, and THE CITY OF ST. LOUIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

RAYMOND A. BRUNTRAGER*
LAUREL T. SIEMERS
BRUNTRAGER & BILLINGS, P.C.
1015 Locust - Suite 820
St. Louis, Missouri 63101
(314) 621-0066

Attorney for Petitioner

*Counsel of Record

May 15, 1989

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED

Missouri Revised Statutes §86.253.4 provides that policemen who retire from service be repaid in a lump-sum the total amount of their contributions to the St. Louis Police Retirement System. The statute took effect on September 28, 1981, resulting in the classification of two groups of retirees, with only one group receiving refunds. The questions presented are:

I. Whether a state court may interpret a state statute in a way that conflicts with other related statutes and its own pronouncements in order to validate discriminatory treatment between similarly situated retired persons, and remain consistent with the Fourteenth Amendment?

II. Whether Mo. Rev. Stat. §86.253.4, as applied, discriminates against police officers who retired prior to September 28, 1981, in violation of their constitutional right to equal protection of the laws?

LIST OF PARTIES

The parties to the proceedings below were petitioner Arthur Voellinger, for himself and as a class representative, and the respondents the Police Retirement System of St. Louis and its trustees and the City of St. Louis.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	3
Statement of the Case	5
Reasons for Granting the Petition	8
I. In applying this Court's rational basis test to uphold the challenged legislative classification, the Missouri Court of Appeals has interpreted a state statute in a way that conflicts with other related statutes and applicable decisions of this Court and its own courts	8
II. Missouri Revised Statutes Section 86.253.4 resulted in two classes of retired police officers and, in its application, unconstitutionally infringes upon Fourteenth Amendment guarantees of equal protection of the laws	12
Conclusion	14
Appendix:	
Appendix A - Order of the Missouri Supreme Court denying transfer	A-1
Appendix B - Order of the Missouri Court of Appeals, Eastern District denying rehearing and transfer	A-2

Appendix C - Opinion and judgment of the Missouri Court of Appeals, Eastern District A-4

Appendix D - Findings, Order and Judgment of the Circuit Court of the City of St. Louis . A-19

TABLE OF AUTHORITIES

Page

Cases:

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 13

Dandridge v. Williams, 397 U.S. 471 (1970) 6,8

McGowan v. Maryland, 366 U.S. 420 (1961) 13

Metro Auto Auction v. Director of Revenue, 707 S.W. 2d 397 (Mo. 1986) (en banc) 10

Police Pension & Relief Bd. of Denver v. McPhail, 338 P.2d 694 (Colo. 1959) (en banc) 10

Police Retirement System of Kansas City v. Kansas City, 529 S.W.2d 388 (Mo. Ct. App. 1973) 11

State ex rel. Cleaveland v. Bond, 518 S.W.2d 888 (Mo. 1972) (en banc) 11

State ex rel. Sanders v. Cervantes, 480 S.W.2d 888 (Mo. 1972) (en banc) 11

State ex rel. Schott v. Foley, 741 S.W.2d 111 (Mo. Ct. App. 1987) 10

United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 6,8,13

Uricoli v. Board of Trustees, Police & Firemen's Retirement Sys., 449 A.2d 1267 (N.J. 1982) 10

Vangilder v. City of Jackson, 492 S.W.2d 15 (Mo. Ct. App. 1973) 11

Western & Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648 (1981) 9

No.

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OCTOBER TERM, 1988

ARTHUR VOELLINGER, for himself and as a class representative,

Petitioner,

vs.

THE POLICE RETIREMENT SYSTEM OF ST. LOUIS, *et al.*, and THE CITY OF ST. LOUIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

The petitioner Arthur Voellinger respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals for the Eastern District, entered in the above-entitled proceeding on November 29, 1988.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is reported at 763 S.W.2d 298, and is reprinted in the appendix hereto, p. A-4, *infra.*

The opinion of the Circuit Court of the City of St. Louis has not been reported. It is reprinted in the appendix hereto, p. A-19, *infra.*

JURISDICTION

Petitioner intervened in an action in the Circuit Court of the City of St. Louis, asserting claims under 42 U.S.C. §1983. The trial court entered a judgment against petitioner on December 29, 1987. The judgment of the Missouri Court of Appeals, Eastern District was entered on November 29, 1988, affirming the judgment of the trial court.

The Court of Appeals denied a timely motion for rehearing and/or transfer to the Missouri Supreme Court on January 4, 1989. Thereafter, on February 14, 1989, the Missouri Supreme Court denied petitioner's application for transfer. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMEND. XIV, §1.

> AMENDMENT XIV — CITIZENSHIP: PRIVILEGES AND IMMUNITIES: DUE PROCESS: EQUAL PROTECTION: APPORTIONMENT OF REPRESENTATION: DISQUALIFICATION OF OFFICERS: PUBLIC DEBT: ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MO. CONST. ART. III, §39(3)

Section 39. The general assembly shall not have power:

(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public

officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part.

* * *

STATUTES INVOLVED

42 U.S.C. §1983 (1982)

Every person who, under color of any statute, ordinance, regulations, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

MO. REV. STAT. §86.253.4 (1981)

4. In addition to any other annuity or retirement allowance payable under this section and section 86.250, a member, upon retirement, shall be repaid the total amount of his contribution to the retirement system, without interest. The board shall pay the retired member such total amount of his contribution to the retirement system within sixty days after such retired member's date of retirement. Any annuity or retirement allowance repaid to a member under this subsection shall be withdrawn from the police retirement system and no money shall be withdrawn from the general revenue fund of any city of seven hundred thousand or more persons.

MO. REV. STAT. §86.200.1(1) (1957)

1. The following words and phrases as used in sections 86.200 to 86.363, unless a different meaning is plainly required by the context, shall have the following meanings.

(1) "Accumulated contributions" shall mean the sum of all amounts deducted from the compensation of a member and credited to his individual account in the member's savings fund, together with regular interest thereon;

MO. REV. STAT. §86.320 (1957)

86.320. Members' savings fund-contributions, rate of-deduction from compensation

1. The members' savings fund shall be the fund in which shall be accumulated contributions at the rate of seven percent of the compensation of the members.

2. The board of trustees shall certify to the board of police commissioners and the board of police commissioners shall cause to be deducted from the salary of each member on each and every payroll for each and every pay period, seven percent of the compensation of each member.

3. The deductions provided for herein shall be made notwithstanding that the minimum compensation provided by law for any member shall be reduced thereby. Every member shall be deemed to consent to the deductions made and provided for herein, and shall receipt for his full salary or compensation and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for services rendered during the period covered by the payments except as to benefits provided by sections 86.200 to 86.363. The board of police commissioners shall certify to the board of trustees on each and every payroll or in such other manner as the board of trustees shall prescribe the amount deducted, and such amounts shall be paid into said members' savings fund and shall be credited together with regular interest thereon to the individual account of the member from whose compensation said deduction was made.

4. The board of trustees is authorized at its discretion to grant additional benefits for such parts of contributions as were

made prior to the adoption of the seven percent rate for all members which were in excess of the compulsory contributions required of each member.

STATEMENT OF CASE

Petitioner Arthur Voellinger retired from the St. Louis Police Department in April 1974. In January 1985, petitioner intervened in an action then pending in the Circuit Court of the City of St. Louis. In October 1984, the Police Retirement System of the City of St. Louis and its trustees had instituted an action seeking a declaratory judgment with respect to their rights and duties pertaining to a then newly enacted statute, Mo.Rev.Stat. §86.366.[1] Defendant City of St. Louis filed an amended counterclaim and the St. Louis Police Veteran's Association and several individuals intervened seeking relief with respect to §86.366.

Petitioner Voellinger, in his individual capacity, and as a representative of a class[2] certified by the trial court, intervened requesting a judgment declaring the rights and duties of the parties under the applicable law, to the effect that Mo.Rev.Stat. §86.253.4 (1981) is applicable to all officers alive on September 29, 1981, whether retired or on active duty, that §86.366 be

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[1] The Retirement System sought a declaration as to whether the provisions of the statute providing for the appointment of pre-September 28, 1981 retirees as special advisors to the Retirement System at compensation set according to the retiree's contribution to the Retirement System are mandatory or directory and, if the statute was deemed mandatory, how such program is to be funded. On April 20, 1987, judgment was entered in the action with respect to §86.366. The court determined that §86.366 is permissive or directory, rather than mandatory. Intervenors Robert Griffin, et al's motion to reconsider, vacate and amend the judgment was subsequently denied. No appeal was taken from that order. The instant action does not concern §86.366.

[2] The class represented by petitioner consists of approximately 541 retired police officers alive on September 27, 1981.

declared moot, and requested a money judgment in favor of petitioner and the class he represents and attorneys fees. The court ordered a separate trial on petitioner Voellinger's claims.

Petitioner Arthur Voellinger's claims were tried on December 15, 1987. Petitioner challenged the application of the Mo.Rev.Stat. §86.253.4, asserting that by providing lump-sum refunds of individual contributions to the Police Retirement System to those retiring on or after September 28, 1981 only, the statute operates to discriminate against prior retirees.

The trial court adopted the City of St. Louis' proposed findings of fact and conclusions of law and held there were two rational bases for denying lump-sum refunds to pre-September 28, 1981 retirees: (1) Mo.Const.Art. III, Sec. 39(3) prohibited such refunds, and (2) that an unfunded liability would be created impairing the funds of the system.

Petitioner took a timely appeal to the Missouri Court of Appeals, Eastern District. The Court of Appeals, applying the standard enunciated in *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), *Dandridge v. Williams*, 397 U.S. 471 (1970) and other judicial authorities, affirmed the trial court's holding that a rational basis exists for the classification between pre-September 28, 1981 retirees and those retiring on and after that date. The court determined, (p. A-13, *infra*) (emphasis in original) that a member's contributions to the retirement system:

> in reality are not earned *compensation;* the contributions are part of the statutory scheme to provide a pool of money to pay retirement benefits to policemen who retire. The contributions made are part of the statutory agreement to provide pensions for retired officers who retire prior to September 28, 1981.

The court further found there was substantial evidence to support the judgment that the creation of an unfunded liability and

impairment of the system provided a rational basis for refunding contributions to post-September 1981 retirees only.

On January 4, 1989, the Court of Appeals denied petitioner's motion for rehearing and or transfer to the Missouri Supreme Court. Petitioner's application for transfer to the Missouri Supreme Court was denied on February 14, 1989.

REASONS FOR GRANTING THE PETITION

I.

In applying this Court's rational basis test to uphold the challenged legislative classification, the Missouri Court of Appeals has interpreted a state statute in a way that conflicts with other related statutes and applicable decisions of this Court and its own courts.

Under the rational basis standard established by this Court in cases involving social and economic benefits, classification is deemed permissible if it is reasonably related to a legitimate state purpose. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-176 (1980); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). While lawmakers are accorded a great deal of deference in equal protection challenges to legislation, *see United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 179 (citation omitted), it does not follow that in validating a legislative classification, a state may ignore established legal principals and its legislature's unambiguous definition of a statutory term and interpret the same term in a related statute in a contradictory manner. To allow such would render this Court's rational basis test meaningless and necessitates this Court's attention.

Missouri Revised Statutes Section 86.253.4 provides retired St. Louis police officers with lump-sum refunds of the amount of their individual contributions to the retirement system. Since taking effect on September 28, 1981, police officers retiring on that date and thereafter have received lump-sum refunds of their contributions. The only differentiation determining which retirees receive such refunds is whether the officer retired before or after September 28, 1981. This Court has set forth two questions which must be answered in determining whether a challenged classification is rationally related to achievement of a legitimate state purpose: "(1) does the challenged legislation have a legitimate purpose, and (2) was it reasonable for

lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 688. (1981).

The purpose of Mo.Rev.Stat. §86.253.4 was never articulated in any of the state court opinions nor was any such evidence presented during the trial. Petitioner presumes and does not quarrel with the legislature's desire to reward retired police officers for years of loyalty and service by refunding the contributions they were required to make to the St. Louis Police Retirement System.[3] However, in adopting the justifications urged by respondents, the State court took the curious approach of unnecessarily going out of its way to construe a statutory term, rejecting reason and established law.

The Missouri Court of Appeals held that Mo.Const.Art. III §39(3) provided a rational basis for the discriminatory treatment of retirees. However, the plain language of the state constitution and the applicable statutes clearly demonstrate the refunds are allowable under Missouri law.

Mo.Const.Art. III §39(3) proscribes the grant or authorization of any extra compensation, fee or allowance to a public officer after services have been rendered. Thus, the repayments authorized by §86.253.4 are prohibited to pre-September 28, 1981 retirees only if it is "extra compensation." But reason and Missouri law dictate the compulsory contributions are withheld "earned compensation."

The plain language of the statutes governing the retirement system and common sense reveal that a member's personal contributions to the Retirement System is *earned compensation*. An

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[3] Missouri has no policy of preserving legislative history with respect to its laws.

officer pays federal, state and city *earnings*[4] taxes on the amounts contributed. Mo.Rev.Stat. §86.200.1(1) (1957) (emphasis added) defines accumulated contributions as the sum of all amounts *deducted* from the *compensation* of a member. Section 86.320 provides that an officer's contribution shall be seven percent of his *compensation* and *deducted* from an officer's *salary* each and every payroll for each and every pay period. Mo.Rev.Stat. §§86.320.1, 86.320.2 (1957). "Where the language is clear and unambiguous, there is no room for construction. This Court must be guided by what the legislature said, not by what the Court thinks it meant to say." *Metro Auto Action v. Director of Revenue*, 707 S.W.2d 397, 401 (Mo. 1986) (en banc) (citations omitted); *State ex rel. Schott v. Foley*, 741 S.W.2d 111, 113 (Mo.Ct.App. 1987). Section 86.253.4 provides for the lump-sum *repayment* of the total amount of an officer's contribution to the retirement system, without interest. These statutes could not be more clear and unambiguous.

Further, courts that have grappled with the nature of public pensions and specifically addressed funds withheld from one's salary readily acknowledge that an employee's mandatory contribution is compensation earned. *Uricoli v. Board of Trustees, Police & Firemen's Retirement Sys.*, 449 A.2d 1267, 1272 (N.J. 1982); *Police Pension & Relief Bd. of Denver v. McPhail*, 338 P.2d 694, (Colo. 1959) (en banc). "Merely because the deductions are compulsory, as are deductions for income tax, and do not come into the member's actual possession, it does not follow that he has not earned the money or that it is not part of his compensation." *Police Pension & Relief Bd. of Denver v. McPhail*, 338, P.2d at 689-99.

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[4] Since 1959 the City of St. Louis has imposed a one percent tax on salaries, wages, commissions and other compensation earned by city residents and non-residents who work in the city. Revised Code of St. Louis Ch. 5.22 (1980).

Throughout the opinion, the Court of Appeals speaks of *refunds* of contributions. Yet the Missouri Court of Appeals held that, with respect to petitioner and members of his class:

> "the contributions in reality are not earned *compensation*; the contributions are part of the statutory scheme to provide a pool of money to pay retirement benefits to policemen who retire. The contributions made are part of the statutory agreement to provide pensions for retired police officers who retire prior to September 28, 1981.
>
> . . . [T]he contributions made by appellant and those whom he represents were not "earned compensation" because their "contracts" for service did not include any provision to return the contribution made.

The conflict between the court's characterization of an officer's required contributions and the actual language of Mo.Rev.Stat. §§86.253.4, 86.320 and 86.200.1(1) could not be more obvious. Moreover, the statutory scheme to provide the pool of money to pay retirement benefits is the same today as it was before September 28, 1981. *See* Mo.Rev.Stat. §86.320 (1957).

Petitioner agrees that any *extra* compensation in the form of increased monthly pension payments, cost-of-living adjustments, new health or life insurance benefits, or additional annuities after a police officer has retired would be impermissible. *See, e.g., State ex rel. Sanders v. Cervantes,* 480 S.W.2d 888 (Mo. 1972) (en banc) (life insurance); *Police Retirement Sys. of Kansas City v. Kansas City*, 529 S.W.2d 388 (Mo. 1975) (cost of living increase); *State ex rel. Cleaveland v. Bond*, 518 S.W.2d 649 (Mo. 1975) (grant of pensions to judges after retirement). However, "[s]ection 39(3) pertains to extra compensation given after the service has been performed, *not to compensation earned during the service but taken after the period of service.*" *Vangilder v. City of Jackson*, 492 S.W.2d 15, 18 (Mo.Ct.App. 1973) (emphasis added).

The Missouri courts' far reaching attempt to justify the inequitable application of a statute authorizing the repayment of compensation earned by retired police officers tramples on the constitutional rights of more than five hundred faithful public servants. Such misapplication of established law and ignoring of clear facts in reaching a desired conclusion must not go unchecked. This honorable Court's failure to grant this petition would effectively abrogate the rational basis standard.

II.

Missouri Revised Statutes Section 86.253.4 resulted in two classes of retired police officers and, in its application, unconstitutionally infringes upon Fourteenth Amendment guarantees of equal protection of the laws.

The Missouri Court of Appeals affirmed the trial court's determination that the creation of an unfunded liability and impairment of the system provided a second rational basis for denying pre-September 28, 1981 retirees refunds of contributions to the retirement system. Having demonstrated the irrationality of the Missouri Courts' application of the rational basis standard with respect to whether the state constitution prohibits the refunds to pre-1981 retirees, it appears the courts were determined to find a way of upholding the challenged classification regardless of substantial evidence dispelling purported reasons. This second alleged rational basis was post hoc justification and contrary to the evidence.

The trial court found that the City would be required to increase its contributions in order to keep the system in balance if pre-1981 retirees were refunded their contributions at the present time. (p. A-20, *infra*). The proper test is whether, *in 1981*, an unfunded liability would have been created and the system impaired. The evidence revealed that in 1981, while cost impact studies of refunding contributions to future retirees were presented to the legislature, there were no similar studies regarding repaying those already retired and none were requested. In

addition, §86.253.4 is mandatory and places no limitation with respect to increasing the City's contribution. The actuarial valuation reports in evidence state that increases in retirement benefits have "kept the system up to date and have been soundly funded by *increases in the City's contribution rate*." (Petitioner's Exhibit 1 and 2 at 4) (emphasis added). Further, the evidence revealed substantial actuarial gains in the system since 1981 and dispelled the argument that the refunds would have affected the soundness of the system.[5] *See United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 456. Finally and most significantly, the record demonstrates there *already existed* an unfunded accrued liability in 1981 in the amount of $18,846,108.00. (Petitioner's Exhibit 2 at 19). In 1980, the unfunded accrued liability as $23,100,645.00 (Petitioner's Exhibit 1 at 11). The fact that there was an unfunded liability of approximately $19 million in 1981 and $23 million in 1980 without impairing the system renders irrational the court's holding that the creation of an unfunded liability was a rational basis for denying lump-sum refunds to prior retirees.

The court's holding clearly conflicts with the equal protection analysis developed by this Court for the reason that the rational bases that have been upheld in challenged legislation were either *demonstrated, see United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 169 (legislative history demonstrated windfall benefits threatened system); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (the Quarters as tourist attraction), or there was *no evidence to rebut* them. *See McGowan v. Maryland*, 366 U.S. 420, 426-27 (1961) (no evidence to dispel reasonable basis advanced for Sunday closing law). There was no demonstration, through legislative history or otherwise, that the reason for the resulting classification and different treatment of retirees

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[5] According to the 1981 actuarial report, assets in the retirement system totaled more than $137 million (petitioner's Exhibit 2 at 7). In 1985, assets were approximately $215 million.

was that an unfunded liability would be created impairing the system and increasing the City of St. Louis' contribution. To the contrary, there was substantial evidence to dispel this allegedly reasonable basis, including the showing of a $20,000,000.00 surplus in the benefit reserve fund. *See* Mo.Rev.Stat. §86.323 (1957), (p. A-8, *infra*). In misapplying this Court's standard in equal protection cases, the Missouri courts have denied constitutional guarantees to a significant number of faithful public servants.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

/s/ Raymond A. Bruntrager
/s/ Laurel T. Siemers
Bruntrager & Billings, P.C.
1015 Locust, Suite 820
St. Louis, Missouri 63101
(314) 621-0066

APPENDIX

APPENDIX A

No. 71321 ED 54410

IN THE SUPREME COURT OF MISSOURI

January Session 1989

The Police Retirement Systems of St. Louis,
Plaintiff-Respondent,

v.

The City of St. Louis, et al.,
Defendants-Respondents,

and

Arthur J. Voellinger, etc.,
Intervenor-Appellant.

Filed: Feburary 15, 1989

Now at this day, on consideration of Intervenor-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1989, and on the 14th day of February 1989, in the above entitled cause.

Given under my hand and seal of said court, at the City of Jefferson City, this 14th day of February, 1989.

/s/ Thomas F. Simon, Clerk
/s/ Kathleen Blanton, D.C.

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: Attorney Of Record PAGE: 1 of 2

FROM: Deirdre O. Ahr, Clerk DATE: January 4, 1989

RE: MOTIONS FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

1.	50239	STATE OF MISSOURI, RESP.
	VS.	LOCKETT, MORRIS, APP.
2.	50317	STATE OF MISSOURI, RESP.
	VS.	PRICE, DARRYL M., APP.
3.	53055	BROWN, VALERIE, RESP.
	VS.	STATE FOARM MUTUAL AUTOMOBILE INSURANCE CO., APP.
4.	53784	STATE OF MISSOURI, RESP.
	VS.	CLAYPOOL, EDWARD, APP.
5.	53830	MELTON, ROBERT, RESP.
	VS.	ILLINOIS CENTRAL GULF RAILROAD CO., APP.
6.	53892	DANNA, PETER J., ET AL., APP.
	VS.	CASERLY, FRANCIS A., RESP.
7.	53972	JUN, STEVEN & SUSIE, RESP.
	VS.	MURPHY, JAMES, D/B/A METRO BUSINESS BROKERS, APP.
8.	54177	STATE OF MISSOURI, RESP.
	VS.	PICKENS, CHARLES, APP.
9.	54399	GIESELMAN, GARY, APP.
	VS.	STATE OF MISSOURI, RESP.

10.	54410	THE POLICE RETIREMENT SYSTEM, RESP.
	VS.	CITY OF ST. LOUIS, ET AL., RESP.
11.	54501	ADAMS, FANNIE, RESP.
	VS.	ORKIN EXTERMINATING COMPANY, APP.
12.	54537	MORRIS, ANTHONY, APP.
	VS.	STATE OF MISSOURI, RESP.

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

The Police Retirement System of St. Louis,
Plaintiff-Respondent,

v.

The City of St. Louis, et al.,
Defendants-Respondents,

and

Arthur J. Voellinger, for himself and as representative of a class,
Intervenor-Appellant.

No. 54410

Appeal from the Circuit Court of the City of St. Louis.

Hon. Thomas M. O'Shea, Judge

Opinion Filed: November 29, 1988

This is an appeal by intervenor-appellant, Arthur Voellinger, for himself and members of a certified class of retired police officers from an order and judgment entered on December 29, 1987 by the circuit court of the City of St. Louis denying refunds of contributions he and others made to the police retirement system prior to the effective date of a statute, effective September 28, 1981. On appeal, appellant-Voellinger claims that policemen who retired on and after September 28, 1981 are entitled to their refunds and denying refunds of contributions to those retiring before September 28, 1981 constitutes discrimination and a violation of equal protection of the laws. Since, under the law and judicial authorities we find no equal protection violation, we affirm the judgment.

I.

In 1981, the eighty-first general assembly adopted certain amendments to § 86.253, R.S.Mo. 1986, relating to retirement allowances for policemen in the City of St. Louis. This bill was approved by the Governor and become effective September 28, 1981. Subsection 4 of § 86.253 provides in pertinent part:

* * * * *

> 4. In addition to any other annuity or retirement allowance payable under this section and section 86.250, a member, upon retirement, shall be repaid the total amount of his contribution to the retirement system, without interest. The board [of trustees] shall pay the retired member such total amount of his contribution to the retirement system within sixty days after such retired member's date of retirement . . . .[1]

In 1984, the General Assembly and the Governor also approved H.B. 1103. Laws, 1984, p. 371. That bill, now § 86.366, R.S.Mo. 1986 provides generally that the board of trustees may "by rule" adopt a program whereby, in addition to any other retirement allowance or compensation, any retirant who is receiving retirement benefits and "who retired *prior to September 28, 1981*," shall, upon application be made a special advisor to the retirement system and "shall be paid as compensation for his services as special advisor a lump sum payment in an amount equal to the total amount of his contributions to the retirement system, without interest . . . ." Subsection 2 pro-

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[1] Subsection 5 of the same Act provides that "[a]ny person who is receiving retirement benefits from the retirement system, upon application to the board of trustees, shall be made, constituted, appointed and employed by the board of trustees as a special consultant . . . . For such services he or she shall be compensated monthly in an amount which, when added to any monthly retirement benefit . . . shall, . . . total four hundred dollars; . . . ."

vides that *if* the board adopts such a program, immediately after August 13, 1984, the board shall establish a system of processing and approving qualified applicants for appointment and payment on a staggered basis. That section further provides that if the funds of the system are insufficient to pay such compensation without impairment of the funds, the compensation is to be reduced in the same proportion. Subsection 3, § 86.366, provides that any amounts paid under this section shall be withdrawn from the funds of the retirement system and none shall be withdrawn from the general revenue fund of the city.

On October 4, 1984, the Police Retirement System of the City of St. Louis and its board of trustees, respondents here, filed its petition in the circuit court seeking a declaratory judgment with respect to their duties pertaining to § 86.366, *supra*. Specifically, the Retirement System sought a declaration as to whether the provisions of § 86.366 providing for the appointment of retirees who retired prior to September 28, 1981 as "special advisors" at compensation set according to the retiree's contribution were mandatory or directory and if mandatory, how the program was to be funded. In this posture of the case, appellant-Voellinger, in his individual capacity and as representative of a class of retired officers, the St. Louis Police Veteran's Association and certain officers,[2] some of whom retired prior to and some after September, 1981, sought leave to intervene. On January 31, 1985, Voellinger and others were granted leave to intervene. The court also sustained a motion that the action may be maintained as a class action under Rule 52.08, certified the class, and ordered a separate hearing on intervenor-Voellinger's claim.

On April 20, 1987, judgment was entered on the petition filed by the Retirement System. The trial court adjudged that § 86.366 is permissive and directory, and not mandatory. No appeal was taken from that order.

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[2] Robert Griffin, Edward Harper, Edmund Morgan, Frank Eresh, James McGauley and William Homan.

On September 21, 1987, Voellinger filed his third amended petition. Therein he alleged that he maintains this action for himself and as representative of a class certified by the court; that he retired from the St. Louis Police Department on April 1, 1974 and that during his many years of service he regularly contributed to the police retirement system which accumulated to $11,458.03. He alleged that this amount was not returned to him. He also alleged that others, approximately 541, were in the same class and their contributions also were not returned,[3] but that officers who retired *after* September 28, 1981 received their contributions they had made to the system. This distinction, he alleged, was based on official policy, and violated their civil rights pursuant to 42 U.S.C. § 1983. Voellinger prayed for a declaratory judgment declaring that § 86.253.4 be made applicable to all officers whether or not they retired prior to or after September 28, 1981, and that a classification distinguishing between officers who retired before September 28, 1981, and those who retire after is discriminatory without a rational basis. He contended therefore that the statute is unconstitutional, requested damages, and that contributions made to the retirement system be refunded.

On December 16, 1987, a separate hearing was held on intervenor-Voellinger's third amended petition. Mr. Voellinger testified that he became a police officer on April 6, 1942 and retired April 1, 1974. During this time he contributed to the police retirement fund but had never received the return of his contribution. He did receive a monthly pension all during the time of his retirement, but did not apply, pursuant to statute, to be a "special advisor."

There is no necessity to delve into the numerous, complicated and actuarial facts. A summary suffices.

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[3] Amounting to approximately $5,300,000.

The thrust of Voellinger's evidence was that there was some $20,000,000 surplus in the benefit reserve fund according to the valuation balance sheet of September 30, 1981 which fund has grown since that time. There was also substantial testimony on certain assumptions used in the 1981 actuarial study and experience in subsequent years. Two of the assumptions used were an interest rate assumption and a salary scale assumption. While a seven percent interest rate assumption was used, the rate was actually larger, and while the salary increase assumption used was about 7.5% the actual increase was approximately 5.5%. A slight change in the assumption rates would have, it was contended, permitted repayment of contributions. The benefit consultant for Voellinger, an actuary, testified that in his opinion if the actuarial assumption was adjusted within reasonable limits, the system could have remained in balance.

The benefit consultant for the Retirement System testified that the system is funded by contributions by the members of the system and the city. The pool of money comes from several sources including contributions made. Contributions made by employees, plus investments based on certain assumptions provide a funding equation. In his opinion, if funds were withdrawn from the system in a lump sum, the requirement of the City would increase to keep the system in balance. All the funds must be viewed together. In his opinion, a refund of contribution would be a "benefit improvement," an additional benefit paid above and beyond the service retirement benefit.

On December 29, 1987, the trial court entered its findings, order and judgment. The court found that Voellinger represents a class of individuals (or their heirs) who retired prior to September 28, 1981; that the police retirement system is a legal entity, and that the intervenor seeks declaratory relief and damages pursuant to § 86.253 which entitles retirees who retire on or after September 28, 1981 to recover their contributions, but no similar provision is made for those who retired prior to that date, and such distiction does not violate equal protection.

The court found a "rational basis" for providing a refund of lump-sum contributions to those officers retiring on and after September 28, 1981. To grant the benefit to retirees before that date "would create an unfunded liability upon the Retirement System the payment of which would constitute a 'benefit'[4] and would impair the funds" of the retirement system. The court further found that a return of the lump-sum contributions to pre-September 1981 retirees would increase the contribution required by the City to keep the pool of retirement funds intact to meet its liabilities, and that approximately $9 million dollars would be needed to make such lump-sum payments. Budget constraints and insuring the solvency of the system are included in the rational basis for different treatment. The court further found that it would be imprudent to change the "assumption rates" without a careful expensive study, and concluded that when dealing with pension systems, a difference in treatment will be upheld, if supported by a rational basis. The rational basis here is found in Art. III, § 39(3), Mo. Const. prohibiting the grant of "additional compensation" after services have been rendered.

The court therefore decreed that § 86.253.4, insofar as it classifies persons who retired prior to September 28, 1981 differently than persons who retired thereafter is constitutional under Missouri and federal law and does not violate 42 U.S.C. § 1983. Judgment was therefore rendered against appellant-intervenor, Voellinger.

In due time, Voellinger appealed contending that § 86.253.4 violates equal protection of the laws and discriminates between

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[4] The court did not use the term "extra compensation."

policemen retiring on or after September 28, 1981 and those who retired prior to that date.[5]

On appeal, appellant contends that the trial court erred in denying the lump-sum refund of contributions made by policemen who retired prior to September 28, 1981 because (1) the Missouri Constitution, Art. III, § 39(3) does not prohibit such refunds and therefore making a distinction between policemen who retire before and after the effective date is not a rational basis for distinction, and (2) there is no evidence to support the court's finding that such refunds would create an unfunded liability and impair the funds of the retirement system.

He argues that in enacting § 86.253.4, the general assembly did not draw any distinction as to who to receive refunds, and the classification by the effective date of the statute, September 28, 1981, is not rationally related to any legitimate governmental interest. He contends that, while Art. III, § 39(3) limits the power of the general assembly to grant any extra compensation, fee or allowance to a public officer, the refund of contributions, "although an extra benefit," or "withheld earned compensation" is not "extra compensation" within the meaning of the Constitution so that in being repaid their lump-sum contributions, police officers who retired prior to the effective date of § 86.253.4, would be getting "back monies already earned" and such monies would not therefore be extra compensation.

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[5] In this appeal the City contends that the intervenor-appellant is challenging the validity of § 86.253.4, hence the jurisdiction of this appeal is properly within the exclusive jurisdiction of the Supreme Court. Art. V, § 3, Mo. Const. The City has therefore moved to dismiss the appeal or in the alternative to transfer the case to the Supreme Court. The motion was taken with the case. It is now denied. This appeal does not involve the validity of the statute but the proper application of the statute as to whether it is applicable only to policemen who retire on or after September 28, 1981. It is not the validity of the statute that is being challenged; it is the application of the statute.

II.

Art. III, § 39(3) of the Missouri Constitution provides that:

> The general assembly shall not have power:
>
> * * * * *
>
> (3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part; . . . .[6]

Under the equal protection clause of the United States Constitution, unless a suspect class is involved or a right is deemed to be fundamental which requires strict scrutiny, a classification which has a rational basis does not violate equal protection. When social and economic legislation is challenged as being violative of equal protection, a classification or distinction does not violate the Constitution it the classification has some reasonable or rational basis. *U.S.S.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1981); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 1161-1162, 25 L.Ed.2d 491 (1970). A state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. To pass constitutional muster the classification must bear some rational relationship to a legitimate state purpose. Under that test, the party challenging the constitutionality of the statute has the burden of proving that the statute denies equal protection and the legislation will not be set aside if any set of facts may be conceived to justify it. *See Langston v. Levitt*, 425 F.Supp. 642, 646 (S.D.N.Y. 1977).

In *U.S.R.R. Retirement Bd. v. Fritz, supra*, the Supreme Court of the United States held that it was not constitutionally

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[6] Art. I, § 13 prohibits retroactive legislation.

impermissible for Congress to draw lines between groups of employees for the purpose of phasing out railroad retirement benefits.

The rational basis test therefore is the appropriate standard in this case. *O'Neil v. Baine*, 568 S.W.2d 761 (Mo.banc 1978). In *Muzquiz v. City of San Antonio*, 520 F.2d 993 (5th Cir. 1975), *on reh.*, 528 F.2d 499 (1976), *vac.* 438 U.S. 901, 98 S.Ct.3117, 57 L.Ed.2d 1144 (1978); *on remand* 586 F.2d 529 (1978), former policemen and firemen challenged the operation of the pension fund and sought refunds of amounts they had contributed to the system while they were serving and before becoming eligible for benefits. The court held that while it is true the plaintiffs were treated differently from other employees who did not contribute, the treatment was not irrational. Policemen and firemen cannot be considered a suspect class requiring strict scrutiny nor could their interest in recovering their contributions be thought of as some fundamental personal right. The court held that these plaintiffs were not entitled to refunds of their contributions, and requiring contributions from them had a rational relation to the funding of a system with better benefits than other state retirement plans.

In *Langston v. Levitt, supra*, 425 F.Supp. 642 (S.D.N.Y. 1977), the court held that employees who were denied additional benefits and who were treated differently than employees who were veterans and residents of the state were not deprived of equal protection. A determination of the statute is shaped by the general rule that in the area of economics and social welfare, the State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. The court held that in applying the proper test, the state had a legitimate interest in conferring benefits on its own residents who served in time of war.

In *Hall v. Board of Trustees of Ark. Pub. Emp., Etc.*, 671 F.2d 269 (8th Cir. 1982) the court held that employees who serv-

ed less than five years could be treated differently without violating equal protection from those who served five years or longer. *See also, Musser v. Morton*, 639 F.2d 309 (6th Cir. 1981) (pay differential between elected officials elected prior to 1976 and those elected after did not violate equal protection); *Marsh v. Government of Virgin Islands*, 431 F.Supp. 800 (D.C.Virgin Islands 1977) (classification of government employees for vacation leave solely on basis of date of entry into service does not violate equal protection).

Under the proper standard and the judicial authorities, we hold that a rational basis exists for differentiating between those policemen who retired prior to September 28, 1981 and those retiring on and after that date insofar as the refund of contributions is concerned. The above authorities make clear that classification between pre-1981 and post-1981 retirees does not violate equal protection. There are numerous reasons for our conclusion.

Authorities in Missouri hold that under Art. III, § 39(3), legislation may not grant a former employee increased "benefits" or "add on compensation" after the service is rendered, whether the increased benefits are denominated extra compensation, fees, allowances or benefits. There is therefore a rational basis for the legislation.

Appellant attempts to distinguish between "extra compensation" and "earned compensation" and argues that Art. III, § 39(3) prohibits awarding "extra compensation" but not "earned compensation." He attempts to avoid the proscription of Art. III, § 39(3) by denominating the contributions to the retirement system as "earned compensation" rather than "extra compensation." But the contributions in reality are not earned *compensation*; the contributions are part of the statutory scheme to provide a pool of money to pay retirement benefits to policemen who retire. The contributions made are part of the statutory agreement to provide pensions for retired officers who retire prior to September 28, 1981.

Appellant attempts to show that there is a sufficient $20 million surplus in the system to make refunds to retired officers and that small changes in assumptions of interest rates and increased wages would provide an additional surplus. But these matters are not determinative of the precise issue whether the retired officers would receive an increased or add-on benefit if their contributions were refunded and they continued to receive their statutory pension benefits. Those benefits are determined by statutory agreements and, unless changed by law, any increased or add-on benefits would be in violation of Art. III, § 39(3).

Whether a pension is regarded as a gratuity or deferred compensation, "adding" to the pension or retirement benefits after retirement, in the absence of express authority, constitutes an "extra" or "add on" benefit in violation of Art. III, § 39(3). *Police Retirement System v. Kansas City*, 529 S.W.2d 388, 391 (Mo. 1975); *State ex rel. Cleaveland v. Bond*, 518 S.W.2d 649 (Mo. 1975) (statute granting retirement benefits to judge who ceased to hold office prior to effective date of statute held unconstitutional); *State ex rel. Phillip v. Public School Retirement System*, 364 Mo. 395, 262 S.W.2d 569, 576 (Mo. banc 1953); *Atchison v. Retirement Board of Police Retire. System, supra*, 343 S.W.2d 25, 34 (Mo. 1960) (police officers who retired before time when police pension statutes were repealed and reenacted substituting a new formula were not entitled to have their pensions calculated by the new formula); 142 A.L.R. 938, 939 (1943); 60A Am.Jur.2d, Pensions and Retirement Benefits, § 1607 (1988); *annot.*, 27 A.L.R.2d 1442; *State ex rel. Sanders v. Cervantes*, 480 S.W.2d 888 (Mo. banc 1972) (life insurance coverage for officers retiring after effective date of statute not covered). In *State ex rel. Sanders v. Cervantes, supra*, the Supreme Court noted that the relators have not asked the court to consider the validity of providing benefits to those policemen who retired prior to the effective date of the statute, and in that connection cited *Kizior v. City of St. Joseph, Mo.*, 329 S.W.2d 605 (Mo. 1959); *Atchison v. Retirement Board of Police Retire.*

System, supra; State ex rel. Breshears v. Missouri State Employees Retirement System, 262 S.W.2d 571, 575 (Mo. banc 1962), and Art. III, § 39(3). In *Breshears, supra*, the court held that an increase in pensions as to retired members is retrospective and unconstitutional. "[W]e must and do hold that the increase so provided is unenforceable and void as to those members [of the state retirement system] who retired prior to October 13, 1961."[7] 362 S.W.2d at 576.

Under these authorities and the express language of § 86.253.4, we believe it to be clear that appellant for himself and others is not entitled to a refund of contributions made to the retirement system. The controlling statutes in effect at the time appellant's pension rights vested, expressed the monetary rights due appellant which included the contributions made to the system. Section 86.253.4 does not either expressly or by implication extend the rights to refunds of contribution to policemen who on the effective date of the act had retired from the service and whose rights had fully accrued and vested prior to the passage of the Act. *See Atchison, supra*, 343 S.W.2d at 34. The legislature in attempting to fill the void for those retirees who retired prior to September 28, 1981 adopted § 86.366 so that those persons could be compensated as special advisors in an amount equal to the amount of his contribution. Such legislation has been upheld. *State ex rel. Dreer v. Public School Retirement System*, 519 S.W.2d 290 (Mo. 1975).

Therefore, to comply with the provisions of the Constitution, § 86.253.4 in authorizing refunds of contributions to those policemen who retire on and after September 28, 1981 and denying such refunds to those already retired constitutes a rational basis for the legislation and does not offend equal protection. In so holding the trial court did not err.

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[7] The court also noted that payment of increased benefits to retired members whose status was fixed would deplete the fund to a substantial extent. 362 S.W.2d at 576.

There is a rational basis in distinguishing between officers who retire before and after the effective date because the contributions made are part of the pool of money to provide pension benefits to those retirees. The contributions made are used to help fund the retirement system, and if appellant and others were refunded their contributions *in toto*, and still receive benefits, part of which is funded by their contributions, they would be receiving add-on benefits from the system. Thus the statute has a rational basis for granting refunds only to those who retire after 1981. Voellinger admitted that he received approximately $91,000 since his retirement, part of which was the contributions made. In the event of death, his beneficiary or estate would receive a benefit up to the full amount of his contributions.

Furthermore, the plain language of § 86.253.4 provides that policemen are to be refunded their contributions *upon retirement*. this language is applicable to those who retire in the future, not to those who have already retired.

Finally, the contributions made by apellant and those whom he represents were not "earned compensation" because their "contracts" for service did not include any provision to return the contributions made. If appellant receives a refund of contribution and also receives the same amount of pension, then he and others in a similar situation, are receiving not only their contributions, but a pension which is partially funded by contributions, hence they would receive an amount in excess of what they had agreed to work for and would be receiving add-on benefits for which they have not worked, thus violating Art. III, § 39(3). The rational basis for distinguishing those police officers who retired prior to September, 1981, and those who retire after that date is that during the times they were employed, they were employed under an agreed compensation. For those retired prior to 1981 the agreed benefits, under the statutes, did not include a provision for refunding contributions. For those who retire subsequent to that date the agreed

benefits under existing statutes includes a provision for refunds. The services of those who retired prior to 1981 were rendered under statutes in existence at that time.

In sum, there is no invidious discrimination violating the equal protection clause under § 86.253.4 by not refunding contributions to police officers who retired prior to the effective date of § 86.253.4.

In his second point, appellant contends that the trial court erred in refusing to return the lump-sum contribution because there was no evidence to support its finding that such repayments would create an unfunded liability or impair the funds of the system, hence no rational basis exists for distinguishing between retirees before and after 1981.

The argument goes that there was evidence to show that there was a $20 million dollar difference in figures for the liabilities for members already retired and those entitled to future benefits. Further, the two major assumptions used in the valuation of the retirement system — interest rate assumption and salary rate assumption would have decreased the amount of liabilities of the fund and made it possible to refund the contributions.

But there was sufficient evidence from witnesses that if an amount was withdrawn from the system in a lump-sum, the City would be required to increase its contributions in order to keep the system in balance. There was other evidence that the system would be impaired. The trial court did not err in finding that repayment of the contributions would impair the fund, and did not err in refusing to change the assumption rates without a careful experience study.

Under the principles of *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), the trial court did not err. There was substantial evidence to support the judgment; it did not erroneously declare or apply the law, and the judgment was not against the weight of the evidence.

The judgment is affirmed.

/s/ Joseph J. Simeone, Senior Judge

Dowd, P.C. and Simon, J., Concur.

APPENDIX D

STATE OF MISSOURI)
) ss
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

The Police Retirement System of St. Louis,
Plaintiff,

v.

The City of St. Louis and William L. Webster,
Defendants,

and

Arthur Voellinger, for himself and as a class representative,
Intervenor,

and

Robert Griffin, Edward Harper, Edmund Morgan, Frank Eresh, James McGauley, William Homan and St. Louis Police Veterans' Association,
Intervenors.

Cause No. 844-00333

Division No. 6

Filed: December 29, 1987

FINDINGS, ORDER AND JUDGMENT

Based upon the evidence adduced during the trial of INTERVENOR ARTHUR VOELLINGER'S THIRD AMENDED PETITION on December 16, 1987; and a consideration of trial briefs and memoranda filed by the parties herein, the Court now makes its findings, order and judgment in this cause, as hereinafter stated, to-wit:

FINDINGS

Court fully adopts as its findings of fact and conclusions of law the defendant City of St. Louis proposed findings of facts and conclusions of law, consisting of three (3) typewritten pages, which were filed in this cause of November 2, 1987, and which are reproduced and attached hereto by the Court and fully incorporated in this order.

Court specifically finds there is a rational basis for providing the refund of lump sum contributions to people performing services, to-wit: the post-September 28, 1981 retirees. To grant the benefit to those *not* performing such services, to-wit: the pre-September 28, 1981 retirees, would create an unfunded liability upon the Retirement System the payment of which would constitute a "benefit" and surely would impair the funds of said Retirement System.

The "rational basis" upon which Section 86.253 R.S.Mo. rests is embodied in the provisions of MO. CONST. ART. III, Sec. 39(3), and the Missouri cases interpreting the provisions. This court is mindful that the state legislature is presumed to have acted within its constitutional power despite the fact that, in practice, its laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it.

Court further specifically finds that a return of lump-sum contributions to pre-September 28, 1981 retirees, would increase the contribution required by the City of St. Louis to keep the "pool of retirement funds" intact to meet its liabilities. That approximately $9 million dollars would be needed to make such lump-sum payments to pre-1981 retirees at this time. Court finds it would be imprudent to change the "assumption rates" without a careful experience study, and that the Board of Trustees of the Retirement System should consider any benefit improvement totally independent of the assumption rates. Court finds that the payment of such pre-1981 lump sum con-

tributions would have had severe impact on the Retirement System in 1981, or presently, and at either time would have created an imbalance in the funds. The Court is not impressed with the intervenor's proposal that assumption rates could be adjusted to allow the return of lump-sum contributions without affecting the pool of retirement funds. Budgetary constraints of the retirement systems and the insuring of solvency of the system are certainly included in the "rational basis" of the legislature for differing treatment of post and pre-1981 retirees.

ORDER AND JUDGMENT

It is ORDERED, ADJUDGED and DECREED:

That Section 86.253.4 R.S.Mo.Supp. 1981, insofar as it may classify persons who retire prior to September 28, 1981 differently than persons who retired on or thereafter, is constitutional under Missouri and federal law and does not violate 42 U.S.C. Section 1983.

On Counts I, II and III of INTERVENOR ARTHUR VOELLINGER'S Third Amended Petition judgment is entered *in favor of* plaintiffs, THE POLICE RETIREMENT SYSTEM OF ST. LOUIS, et al., and defendants, THE CITY OF ST. LOUIS and STATE OF MISSOURI; *and against* INTERVENORS ARTHUR VOELLINGER, for himself and as a class representative, and ROBERT GRIFFIN, et al. and ST. LOUIS POLICE VETERANS' ASSOCIATION, a not-for-profit corporation.

Costs herein are taxed against Intervenor ARTHUR VOELLINGER, himself and as a class representative.

This order and judgment deemed final and appealable.

SO ORDERED this 29th day of December, 1987.

/s/ Thomas M. O'Shea

cc: James C. Owen, Esq.
Edward J. Hanlon, Esq.
Richard Weiler, Esq.
James Sanders, Esq.
Raymond A. Bruntrager, Esq.